PANG SUN NAM v. SENG SENG MOTORS & ANOR.

[O. C. J. (Bostock-Hill J.) February 2, 1948]

[Penang — Civil Suit No. 31 of 1947]

International Law — Seizure of car by enemy forces — Sale of car by Custodian of Enemy Property — Validity of sale.

In this case the plaintiff sued the defendants for the return of a Renault car which was taken from his possession by the Japanese occupying forces in December 1941. The said car after the British re-occupation came into the custody of the Custodian of Property and was sold by him to one Lau Hee Peng, who later sold it to the defendants. It was argued for the plaintiff (1) that the car was seized illegally by the Japanese forces (2) that the Custodian seized the car illegally as it was not enemy property and it was not the property of a British or allied or neutral absentee owner, the plaintiff being at all relevant times in Penang, and (3) that no title could be passed by the Custodian which is good as against the title of the Plaintiff.

Held: (1) the Japanese military forces could under International Law seize the car for military purposes; (2) as the car was in the custody of the enemy forces, the Custodian could validly take it into his custody; (3) he could pass a valid title under s. 10 (as amended) of the Custodian of Enemy Property Proclamation.

Cases referred to:—

(1) *Martin v. The World Piano Co.* (1947) M.L.J. 108.

(2) *Cundy v. Lindsay* (1878) A.C. 459.

(3) *Dicker v. Angerstein* 3 Ch. D. 600.

(4) *Sneddon v. Shafe* (1947) M.L.J. 197.

CIVIL SUIT.

T. E. Conaghan for the plaintiff.

Ong Huck Lim for the defendants.

Lee Hong Boh for Lau Hee Peng (Third Party).

Cur. Adv. Vult.

Bostock-Hill J. : — In this case the plaintiff is suing the defendants for the return of a Renault car (former Registration No. P. 2215) which was taken from his possession by the Japanese occupying forces on or about December 20th, 1941. Alternatively, he claims $2,000 as the value of the car. The said car after the British re-occupation came into the custody of the Custodian of Property and was sold by him to the Third Party on 11th January, 1946 and was later sold by the Third Party to the defendants on 20th August, 1946. The plaintiff also claims damages for depriving the plaintiff of its possession and use.

The defendants have had the Third Party brought in to the suit and claim indemnity against him if the plaintiff is successful in his suit. The Third Party states that the defendants knew before purchasing the car that it had been bought from the Custodian and prays that the claims of the plaintiff and of the defendants be dismissed with costs.

It was agreed by all parties that the question of damages should stand over till the legal issues were determined.

The following facts were admitted as proved:—

(1) That on 8th December 1941 the plaintiff was the owner of an 8 H.P. Renault car — 1939 Model, Engine No. 13070, Chassis No. 921054, Registered No. P. 2215 — hereinafter referred to as "the said car".

(2) That the plaintiff lived at 47A, Prangin Lane, Penang, before the Japanese occupation, during most of that occupation (though he was away in Kedah when they arrived and took possession of the said car), and continued to live there on the British re-occupation.

(3) That during the Japanese occupation the said car was used by Japanese occupying officials, one of whom corresponded in status to the British Resident Commissioner, Penang.

(4) That the said car was one of a lot of cars that were, after the British re-occupation, accumulated in the Green Lane Car Dump, Penang, in the custody of the Custodian of Property, Penang, and that the Third Party purchased from the Custodian of Property, Penang, several cars from that dump (including the said car) for $3,500 on 11.1.46. (An agreed bundle of copies of documents (Exhibit P. 1) relating to this sale was put in).

(5) That the Third Party sold the said car to the Defendants for $100 on 11.8.46.

In the present case the said car had come into the custody of the Custodian in the early days of the British re-occupation. There is no evidence as to the exact steps by which it came into his custody but, as it was agreed that it was being used during the Japanese occupation by Japanese occupying officials, I can only conclude that he took possession of it from the Japanese occupying forces.

On behalf of the plaintiff Mr. Conaghan argued, basing his argument on *Oppenheim's International Law*, 6th Edn., Vol. II, pages 312, 313, that the said car could not legally be seized by the Japanese occupying forces. The learned authority at page 312 states:—

> All kinds of private moveable property which can serve as war material, such as arms, ammunition, cloth . . . . . and also all appliances which are adapted . . . . . for the transport of persons and goods such as railway rolling stock, ... carts and horses may be seized and made use of for military purposes by an invading belligerent; but they must be restored at the conclusion of peace, and compensation must be paid for them . . . . . ."

Mr. Conaghan then went on to argue that since the Japanese forces seized the car illegally according to International Law the title to the car remained throughout in the plaintiff and that the Custodian seized the car illegally since it was not enemy property and it was not the property of a British or Allied or neutral absentee owner (since the plaintiff was at all relevant times living in Penang). He contended therefore that the Custodian never had any legal title to the said car and could not under his powers under section 10 of the Proclamation give a good title to the Third Party, who in his turn could not give a good title

to the defendants. He urged that section 10(1) must be read as meaning: "When any property legally or properly taken into custody....."

Finally, Mr. Conaghan argued that even if the Custodian is protected by section 10 (as amended) and by section 12 of the Proclamation yet he was not enabled to pass a title to the Third Party as good as against the title of the plaintiff. He maintained that the title to the car remained in the plaintiff throughout and that no title was vested in any other person than the plaintiff.

With regard to his first contention that according to International Law the said car was not legally seized by the Japanese occupying forces, I find myself unable to agree with Mr. Conaghan. I am of opinion that the said car was adapted for the transport of persons and goods (and there is indeed the evidence of the plaintiff himself that it was used for transporting officials of the occupying forces) and that that use in the circumstances of the invasion and occupation constituted a military purpose.

Whether by being so seized the car became enemy property within the meaning of the Proclamation (No. 14) is a point not altogether easy to decide and to which I will refer again later.

With regard to the passing of the title Mr. Conaghan cited the judgment of Mr. Justice Carey in *Martin v. The World Piano Co.*[1] and also *Cundy v. Lindsay*[2]. I do not think these cases help the plaintiff very much because they are both cases dealing with property (goods) obtained by fraud (or at least under suspicious circumstances) whereas in the present case the Custodian was acting under the authority of the Proclamation and there is no question of fraud. Nor is there any sufficient evidence that the Custodian had any knowledge of the ownership of the car. The only evidence on that point is that of the plaintiff to the effect that about the end of October, 1945 he filled in a claim form at the Vehicles Office in respect of the said car and handed it to the Chief Clerk there. There is no evidence before me as to what happened to that claim form and the said Chief Clerk, though still in Penang, was not called. The plaintiff searched various car dumps (including the Green Lane Dump) for his car but was unable to find it, and on that account (he says), he did not make inquiries at the Custodian's Office. There the matter stands and I do not consider that I can find it proved that the Custodian knew of the plaintiff's claim when he sold the said car.

Mr. Rendle, now the Assistant Custodian of Enemy Property, Penang, stated in evidence that he had searched his files but could not find a record of any claim made by the owner of car P. 2215.

In the Custodian of Enemy Property Proclamation (No. 14) "enemy property" is defined as "any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject", and property includes moveable property.

Section 6(2) states that "The Custodian may, where he deems it expedient, take into or retain in his custody the property of enemy subjects present in the Malay Peninsula."

Was the said car "Property for the time being belonging to.....an enemy or an enemy subject"? I am of opinion that, having been legally appropriated by the Japanese occupying forces it was for the time being their property and that accordingly the Custodian was within his rights in taking it into his custody as enemy property. It is difficult to see how, at the time and under the conditions in which he was acting in 1945 and early 1946, he could do otherwise than take into his custody the private cars that had been used by the Japanese occupying forces.

Mr. Conaghan pressed the view that it was not enemy property and that it could not be sold as such, and then went on to argue that as the owner (the plaintiff) was not absent from the country the Custodian could not take it into his custody under section 8(2) or section 9 of the Proclamation (i.e. as the property of an absentee owner).

He then argued that since the said car was not legally in his custody he could not exercise his powers of sale under section 10(1).

As stated above I am of opinion that the said car was for the time being the property of an enemy subject and as such legally and properly came into the custody of the Custodian, but I do not think it is necessary for the purposes of this case to decide that point.

On 10th October 1946 an amendment was made to the Proclamation by adding sub-section (2) to section 10. Section 10 then reads as follows:—

(1) When any property taken into custody by the Custodian is perishable or liable to waste or deteriorate if kept or kept untenanted, the Custodian may sell the same and retain custody of the proceeds pending directions as to their disposal, or may execute on behalf of the owner leases or tenancy agreements at such rents, upon such conditions and for such terms as the Custodian may think fit.

(2) Any sale by the Custodian purporting to be in exercise of the power of sale conferred upon him by sub-section (1) which has taken place since the date when this Proclamation came into force or which shall hereafter take place, shall be deemed to be a valid sale and shall not be called into question in any Court.

It is important to note in sub-section (2) the words "purporting to be in exercise of the power of sale conferred upon him by sub-section (1)....." Those words must, I think, be given their ordinary meaning.

Stroud's Judicial Dictionary (2nd Edn :), page 1625 contains the following note :—

"When validity is given to anything purporting to be done in pursuance of a Power, a thing done under it may have validity though done at a time when the power would not be really exercisable"

and then cites *Dicker v. Angerstein*[3].

In that case a mortgage contained a power of sale to be exercised by the mortgagee after default, with a proviso that upon any sale *purporting* to be made in pursuance of the power, the purchaser should not be bound to inquire whether default had been made in payment of any principal or interest etc. ... and that, notwithstanding any impropriety or irregularity in any such sale, the same should, as regards the protection of the purchaser, be taken to be within the power ..... It was held that the sale, having been made to a *bona fide* purchaser without notice, was valid, even if the security should prove to have been satisfied.

Mr. Conaghan sought to distinguish the present case by arguing that in *Dicker v. Angerstein*[3] the mortgagee had a good title and only exercised his powers wrongly, whereas in the present case the Custodian had not got a good title.

At first sight this argument seems to carry weight, but it is, I think, necessary to consider carefully the exact wording of sub-section (2) to section 10 of the Proclamation. This sub-section was published in Gazette Notification No. 2569 dated 10th October, 1946 and the Proclamation itself appeared in the B.M.A., Malaya, Gazette dated 1st November, 1945. Section 10(2) was made retrospective with regard to all sales under section 10(1) which had taken place since the coming into force of the Proclamation.

Can it be said, quite irrespective of any title to the said car passing to the Custodian, that the sale was not one purporting to be in the exercise of his power of sale under section 10(1)?

He professed to sell the said car as enemy property. The receipt (see Exhibit P. 1) dated 11th January, 1946 which he gave to the Third Party herein, bears on it the words "Account Enemy Property", and, except for the evidence (referred to above) given by the plaintiff about filling in a claim form, there is no suggestion that the Custodian was not purporting to sell the car as enemy property. As I remarked above, the question as to whether it was enemy property within the meaning of the Proclamation may not be easy to decide, but it is nevertheless clear that the Custodian purported to sell it as such.

Also, I respectfully agree with the reasoning of Brown J. in *Sneddon v. Shafe*[4] when he decided that a motor car falls within section 10(1) of the Proclamation in that it is liable to deteriorate.

There thus remains to dispose of only Mr. Conaghan's contention that in any event the effect of section 10(2) is only to give protection to the Custodian and cannot pass a valid title to the purchaser (the Third Party) and thence to the defendants.

In regard to this I hold that the words of section 10(2) are clear and definite and that since it contains the expression "shall be deemed to be a valid sale" I must interpret those words in their ordinary sense and not, as Mr. Conaghan contends, as a sale valid as regards the Custodian, but invalid as regards the purchaser. I am the more inclined to hold this seeing that the words "and shall not be called into question in any Court" have the effect of strengthening the words "shall be deemed to be a valid sale" used just previously.

I was also referred to section 21(1) of the Sale of Goods Act, 1893, dealing with Transfer of Title, which reads :—

Sale by person not the owner. — Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had . . . . . .

This must however be read together with Proviso 2(b) to the said section, which reads :—

Provided also that nothing in this Act shall affect — (b) the validity of any contract of sale under any special common law or statutory power of sale, or . . . . .

In the present case the Custodian was purporting to act under his statutory powers.

I therefore hold that the sale of the said car passed a valid title to the Third Party and thence to the defendants and that the claim of the plaintiff fails.

The costs of the defendant and of the Third Party must be paid by the plaintiff.

Claim dismissed.